



IT IS SO ORDERED.
Signed January 12, 2015

A handwritten signature in cursive script, reading "Arthur S. Weissbrodt".

Arthur S. Weissbrodt
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re]	Case No. 13-55492-ASW
ABEL MEKKOUDI and ANDREA MEKKOUDI,]	Chapter 13
Debtors.]	
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ABEL MEKKOUDI and ANDREA MEKKOUDI,]	Adv. Pro. No. 13-05181-ASW
Plaintiffs,]	
v.]	
FIRST TENNESSEE BANK]	Hearing Date: Jan. 12, 2015
Defendant.]	Hearing Time: 2:30 p.m.
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**MEMORANDUM DECISION RE DEFENDANT'S
MOTION TO VACATE PRELIMINARY INJUNCTION**

Before the Court is the motion of Defendant First Tennessee Bank (the "Bank"), which is represented by attorney Bernard Kornberg, to vacate the preliminary injunction imposed by this Court on April 17, 2014. The motion is opposed by Debtors, who are represented by attorney Sara Lipowitz.

Debtors, who were then represented by attorney Judson Farley, filed the underlying chapter 13 case on October 16, 2013. Debtors had filed two prior cases, one of which was pending within a year

1 prior to the filing of the instant case. The stay was therefore due
2 to expire 30 days after filing. Due to an apparent oversight by Mr.
3 Farley, no motion to extend the stay was filed, and the stay
4 terminated. Thereafter, Debtors filed this adversary proceeding,
5 seeking a preliminary injunction to prevent the Bank from
6 foreclosing on its second position lien on Debtors' real property
7 at 2050-2052 17th Avenue, Santa Cruz, CA (the "Property"). The Court
8 granted a preliminary injunction for an indefinite period to permit
9 Debtors time to obtain a loan modification on the first DOT and to
10 have the Court determine the value of the real property. The Court
11 ordered that if the loan modification was denied, counsel for the
12 Bank could move to vacate the injunction.

13 A motion to value was filed on April 17, 2014. The Bank filed
14 an opposition, but Mr. Farley never set the matter for hearing. At
15 the December 9, 2014 hearing, the Court set a hearing on the motion
16 to value for February 6, 2015 at 9:00 a.m.

17 In August 2014, Debtors were turned down for a loan
18 modification. According to a letter dated August 15, 2014, which
19 was sent to Mr. Farley by Nationstar, the servicer on the 1st Deed
20 of Trust, the application was denied due to failure to provide
21 requested documents. According to the declaration of Debtors filed
22 December 9, 2014, Debtors never directly received any
23 correspondence from Nationstar at all, let alone any letter
24 explaining what documents were missing. Debtors also state they
25 were unaware of the denial letter until October during a meeting
26 with Mr. Farley. Debtors state they tried to contact Nationstar to
27 follow up but none of the telephone numbers worked, and their email
28 correspondence went unanswered. Debtors state they have filed a new

1 application for a loan modification, and attach a copy of the
2 return receipt showing delivery to Nationstar on November 17, 2014.

3 In the instant motion, which was filed September 18, 2014, the
4 Bank moves the Court to vacate the preliminary injunction because
5 Debtors' application for a loan modification has been denied and
6 because Debtors had not pursued their motion to value.

7 The hearing on the motion was initially set for October 20,
8 2014 but was continued to December 9, 2014, because Mr. Farley was
9 temporarily suspended from practice, leaving Debtors without
10 representation. Ms. Lipowitz appeared at the December 9 hearing and
11 requested time to file a substantive response, which the Court
12 granted. The Court also set an evidentiary hearing for February 6,
13 2015 on Debtors' motion to value.¹

14 The Bank contends that the Court should vacate the injunction
15 because Debtors cannot obtain a loan modification, nor can they
16 confirm a plan based on their current income and the amount of the
17 arrearages due on the subject loans.

18 However, according to Debtors' declaration in support of their
19 opposition, Mr. Mekhoudi is now able to return to work and expects
20 to be doing some consulting work beginning in January 2015, which
21 will increase the Debtors' income. Additionally, as noted, Debtors
22 have filed a new loan modification application, and the motion to
23 value the Property is currently set for hearing on February 6.

24 _____
25 ¹At the October 20 hearing Mr. Kornberg asked the Court to
26 order that if no timely written opposition were filed, the motion
27 to vacate would be granted. The Court did not so rule, but stated
28 that an attorney needed to appear on behalf of Debtors on December
9, and that such attorney would ideally would have met with the
Mekhoudis well before the hearing. The Court stated that it would
likely grant the motion if Debtors did not appear with an attorney
at the December 9 hearing.

1 Debtors also state they intend to file new schedules in January and
2 supplement their pending loan modification request to reflect an
3 anticipated increase in income due to Mr. Mekhoudi's expected new
4 employment. The Bank argues that the evidence of new employment and
5 of Debtor's recent loan modification application is inadequate.
6 However, the Court accepts the unrebutted statements in Debtors'
7 declaration.

8 The Court understands the Bank's exasperation with the delays
9 that have occurred in this case. However, the Court is unwilling to
10 penalize Debtors for the shortcomings of their former counsel,
11 especially when the likely result is the loss of Debtors'
12 residence. Debtors should be given the opportunity to pursue a loan
13 modification and a lien strip now that they are represented by
14 competent counsel, and now that it appears Debtors' income will be
15 increasing.

16 For these reasons, the Bank's motion is denied without
17 prejudice. Counsel for Debtors may submit a proposed form of order.

18 The Court is not making an order at this time, but wants the
19 Debtors and Ms. Lipowitz to understand that the Court expects
20 Debtors to follow through by filing updated schedules with the
21 Court reflecting their new income as soon as practicable. The Court
22 also notes that the chapter 13 trustee has moved to dismiss the
23 underlying case for lack of prosecution, with a hearing set for
24 February 3, 2015. Debtors should promptly take steps to address the
25 objections to confirmation that were raised by the trustee in her
26 most recent objection to confirmation filed February 27, 2014, and
27 file an amended chapter 13 plan.

28 *** END OF MEMORANDUM DECISION ***

Court Service List

Parties to be served electronically.